No. 11,865

IN THE

United States Court of Appeals

For the Ninth Circuit

TRANS-PACIFIC AIRLINES, LTD.
(a corporation),
Appellant,

vs.

HAWAIIAN AIRLINES, LIMITED
(a corporation),
Appellee.

On Appeal from the District Court of the United States for the Territory of Hawaii.

REPLY BRIEF OF TRANS-PACIFIC AIRLINES, LIMITED, APPELLANT.

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SUMMARY OF REPLY ARGUMENT.

Appellant's opening brief and the briefs of appellee and of the Civil Aeronautics Board as amicus curiae reveal that there are two questions to be considered in the matter of this appeal.

First, there is appellant's contention that, having been issued a Letter of Registration, appellant became exempt by the very terms of the Civil Aeronautics Act of 1938, as amended, from the provisions of Section

401(a) of the Act (49 U.S.C. 481(a)). Such exemption is provided by the express terms of Section 416(b)(1) of the Act (49 U.S.C. 496(b)(1) and Section 292.1 of the Economic Regulations (12 Fed. Reg. 3076) (reprinted in the briefs) promulgated by the Board thereunder. Violation of Section 401(a) (49 U.S.C. 481(a)) is the only basis upon which appellee may bring a *court action,* as is provided in Section 1007(a) of the Act. (49 U.S.C. 647(a).) *Since appellee is limited to violation of Section 401(a) as the basis of court action, and appellant is exempt therefrom, the lower court had no jurisdiction to entertain appellee's action.* Appellee endeavors to controvert this contention upon the basis that, insofar as appellant was operating beyond what appellee alleges to be the tolerable limits of Section 292.1 of the Economic Regulations, and Section 416 of the Act which is the statutory authority therefor, then appellant is in violation of Section 401(a) to that extent. But a reading of the other provisions of the Civil Aeronautics Act of 1938, as amended, demonstrates that there is no such intent in the Act. The argument of appellee really proves too much. On principle, if such an argument is favorably viewed, the same argument would permit *de novo* court action of almost any controversy involving alleged excess operations under the Act. By this reasoning, if the holder of a certificate of convenience and necessity allegedly operates beyond his allowed permits, or contrary to prescribed regulations, he is *pro tanto* in excess of his authorization, and thus *pro tanto* without a certificate to that extent.

Any such reasoning applied in all instances does violence to the salutary principles of the well accepted rule of primary jurisdiction, which is appellant's second and more comprehensive point, and injects the courts in each case into a *de novo* jurisdiction, involving complicated administrative discretion. Such cannot be assumed to have been the congressional intent.

In considering both the above question and appellant's second contention based on the principle of primary jurisdiction, the Court is most respectfully urged that no consideration whatsoever should be given to the lower Court's decision on the merits of the case, and the record with regard thereto. Appellant is maintaining that the lower Court should not have proceeded at all, nor rendered any decision. Appellant's point is as pertinent whether the lower Court had found a violation, or had not. Appellee's argument, and particularly that of the Board, assumes that it is properly before the reviewing Court that appellant is *in fact* in violation, and, in fact, therefore, by their reasoning, *pro tanto* in violation. It is submitted that no such assumption can properly be made. *It is a part of appellant's case here that the Board had primary jurisdiction to determine that very point and should have done so.* Thus, any discussion of the merits of the case as found in the amicus curiae brief of the Board, particularly pages 7 to 12, inclusive, is inappropriate and beside the point, in that this discussion goes to the question of whether appellant was, or was not, in actual violation.

Appellant's second and more comprehensive contention is that the Civil Aeronautics Board had primary jurisdiction to determine whether or not appellant had, in fact, violated Economic Regulations 292.1, and whether or not appellant was operating within and under the conditions under which the Letter of Registration and exemption had been issued by the Civil Aeronautics Board to appellant.

The lower Court should have construed the Civil Aeronautics Act not only as a matter of statutory construction requiring exemption, but also by force of the basic principle of the primary jurisdiction of the Board as a matter of good administrative principle and practice to require that the Civil Aeronautics Board, and not the District Court, should determine the merits of the alleged violations by appellant. The basic reasons for the development and existence of the rule of primary jurisdiction are particularly applicable in this case, as such determination not only required the consideration of an extensive body of complex facts pertaining to operations of a specialized and peculiar nature, which are particularly within the expert knowledge of the Civil Aeronautics Board, but also required uniformity of decision and exercise of administrative discretion as to the future operations of appellant. These are among the most cogent reasons for the existence of the rule. Such a determination by the Civil Aeronautics Board was necessary and required under the Civil Aeronautics Act of 1938, as amended, prior to any jurisdiction by any District Court.

ARGUMENT.

I. APPELLANT WAS EXEMPT FROM SECTION 401 (a) OF THE CIVIL AERONAUTICS ACT OF 1938 AS AMENDED (49 USC 481(a)).

The pertinent sections of the Act have been quoted in all briefs and are now repeated only for clarity. Section 416(b)(1) of the Act (49 U.S.C. 496(b)(1) provides:

> "(b)(1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

The title referred therein is Title IV of the Act and includes Section 401(a). Pursuant to Section 416(b)(1) the Board promulgated Section 292.1 of the Economic Regulations, reprinted in appellant's brief. Appellant was issued a Letter of Registration under the terms of the regulations. Thus, by the clear terms of the Act and the Economic Regulations, appellant became exempt from Title IV and Section 401(a). The exempting provisions of the Economic Regulations 292.1(c)(1) provides:

> "(1) General.—Except as otherwise provided in this section, Irregular Air Carriers shall be exempt from all provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, other than the following:"

The exceptions are not pertinent to this appeal. Appellee contends that this exemption is only partial, that is, only so far as appellant operates within the limits of the Economic Regulations. (Appellee's Brief, p. 10.) The fallacy of appellee's position is that appellant is not required to have a certificate of convenience and necessity by the very terms of the law, and if appellant is in violation, it is in violation *not* of Section 401(a) of the Act, which is the only basis of appellee's action, but of the Economic Regulations under which exemption was obtained, and which Regulations contain comprehensive and fully adequate provisions for remedy of violations *by the Board.*

As pointed out in the summary, appellee has proven too much. By its argument, a holder of a certificate who operated in violation of any part of the Act would be acting *pro tanto* in excess of authority, and in violation of Section 401(a). Thus, any party in interest by such reasoning could enter the District Court in any case and ignore the Board. Surely no such result is either intended or desirable.

That the Act and the Regulations were intended to mean just what they say—appellant is exempt from Section 401(a)—becomes apparent when other provisions of the Act and of the Regulations are consid-

ered. Section 292.1 of the Economic Regulations contains elaborate and complete provisions for revocation and suspension *upon action by and before the Board.*

A United States District Court case, Southern District of New York, decided October 5, 1948, by Judge Kaufman, *American Air Lines, Inc. v. Standard Air Lines, Inc.* (District Court, Southern District New York, decided October 5, 1948, reported in 2 C.C.H. Aviation Law Reporter, 14,757), is directly in point and so well reasoned that appellant respectfully begs indulgence of the Court to quote the entire opinion as a part and parcel of appellant's reply argument. It reads:

United States District Court
Southern District of New York

Civil No. 47-272

American Airlines, Inc.,
Plaintiff,

against

Standard Air Lines, Inc.,
Defendant.

OPINION

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Kaufman, J.

Plaintiff moves to enjoin defendant pendente lite from operating, and from holding itself out to the public as operating regular flights as a common carrier between certain points on the east and west coasts of the United States.

The action is brought for similar permanent relief.

The moving papers allege that plaintiff is an air carrier engaged in air transportation between New York City and Los Angeles, pursuant to certification of public convenience and necessity granted by the Civil Aeronautics Board (hereinafter referred to as the "Board") for regularly scheduled operation between said points; that defendant holds no certificate of public convenience and necessity to engage in air transportation, but is an "Irregular Air Carrier" and the holder of Letter of Registration, No. 826, issued under Sec-

tion 292.1 of the Economic Regulations of the Board. It is then alleged, in substance, that defendant is engaged, and is holding out to the public that it engages, in air transportation between New York City and Los Angeles with a degree of regularity which is not permitted to Irregular Air Carriers; that by its aforesaid actions defendant has exceeded the limits of its authority under Section 292.1 of the Economic Regulations and has thereby forfeited the exemption conferred on Irregular Air Carriers from the requirement of a certificate of public convenience and necessity. Consequently, it is claimed, defendant's operations without such a certificate are illegal and should be enjoined.

There is no dispute as to the number and frequency of defendant's flights, but defendant claims that by virtue of their nature they do not constitute operations of a regularity in excess of those permitted to Irregular Air Carriers.

Apart from the merits, two questions are presented by the motion: first, whether or not plaintiff is "a party in interest" within the meaning of Section 1007(a) of the Civil Aeronautics Act, which gives any "party in interest" the right to apply to the appropriate District Court of the United States for an injunction against violation of the Act; and second, whether or not the Court has jurisdiction of the action.

The papers show that plaintiff, a certificated air carrier, and defendant, the holder of a Letter of Registration as an Irregular Air Carrier, are competing in air transportation between the points involved. This, in my opinion, is sufficient

to make plaintiff a "party in interest" within the meaning of Section 1007(a) of the Act. *Flying Tiger Line v. Atchison T. & S. F. Ry. Co.,* 75 F. Supp. 188.

Section 401(a) of the Act (U.S.C., Title 49, Section 481(a)) provides:

> "(a) no air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation."

Section 1007 of the Act (U.S.C., Title 49, Section 647) provides that if any person violates any provision of the Act, or any regulation thereunder, or any term, condition, or limitation of any certificate or permit issued thereunder,

> "the Board, its duly authorized agent, or, in the case of a violation of Section 481(a) of this chapter, any party in interest, may apply to the (appropriate) district court of the United States,"

for the enforcement thereof,

> "and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise * * *",

If the foregoing were the only provisions to be considered, it would be clear that an air carrier may not engage in air transportation without a certificate of convenience and necessity, and that if it should do so, any party in interest could apply to the appropriate District Court of the United States for an injunction.

There are, however, other provisions which must be considered.

Section 416(a) of the Act (U.S.C., Title 49, Section 496(a)) authorizes the Board to establish classifications or groups of air carriers, as the nature of the service performed by them shall require, and also to establish such rules and regulations pursuant to and consistent with the provisions of the Act, to be observed by each such class or group, as the Board finds necessary in the public interest. This section, in subdivision (b), authorizes the Board in certain circumstances to

> "exempt from the requirements of this subchapter or any provision thereof, * * * any air carrier or class of air carriers, if it finds that the enforcement of this subchapter or such provision * * * is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

Acting under this authorization, the Board promulgated Section 292.1 of its Economic Regulations.

Subdivision (b) of this Section provides:

> "Classification.—There is hereby established a classification of non-certificated air carriers to be designated 'Irregular Air Carriers'. An Irregular Air Carrier shall be defined to mean any air carrier (1) which does not hold a certificate of public convenience and necessity under Section 401 of the Civil Aeronautics Act of 1938, as amended, (2) which directly engages in interstate or overseas air transportation of

persons and property or foreign air transportation of property only, and (3) which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniformed pattern or normal consistency of operation between, or within, such designated points."

Subdivision (c) of Section 292.1 of the Economic Regulation, in so far as here material, reads:

"(c) Exemptions.—(1) General.—Except as otherwise provided in this section, Irregular Air Carriers shall be exempt from all provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, other than the following:"——

and here follow references to the provisions of the Act which are excepted from the exemption. Section 401(a) is not among them.

In other words, Irregular Air Carriers are exempted from the provisions of Section 401(a), the section which requires air carriers to have a certificate of convenience and necessity as a condition of engaging in air transportation. Conse-

quently, air transportation, without such a certificate, by an Irregular Air Carrier to which a Letter of Registration has been issued,[1] would not be a violation of Section 401(a) and would not invest a party in interest with the right, under Section 1007 of the Act, to apply to a District Court for an injunction on the ground that such carrier was violating Section 401(a).

Subdivision (d)(2) of Section 292.1 of the Economic Regulation provides that upon the filing of proper application therefor, the Board shall issue to any Irregular Air Carrier a Letter of Registration

> "which, unless otherwise sooner rendered ineffective, shall expire and be of no further force and effect, upon a finding by the Board that enforcement of the provision of Section 401 (from which exemption is provided in this section) would be in the public interest and would no longer be an undue burden on such Irregular Air Carrier or Class of Irregular Air Carriers."

Subdivisions (d)(4) and (5) of Section 292.1 of the Economic Regulations, read:

> "(4) Suspension of Letter of Registration. —Letters of Registration shall be subject to immediate suspension when, in the opinion of

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[1]Subdivision (d) of Section 292.1 of the Regulation requires that Irregular Air Carriers procure letters of registration from the Board.

"(1) Letter of Registration required.—From and after sixty days after the effective date of this section, no Irregular Air Carriers may engage in any form of air transportation unless there is then outstanding and in effect with respect to such air carrier a Letter of Registration issued by the Board."

the Board, such action is required in the public interest.

"(5) Revocation of Letter of Registration. —Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and wilfull violation of any provision of the Civil Aeronautics Act of 1938, as amended, or any order, rule or regulation issued under any such provision, or of any term, condition or limitation of any authority issued under said Act or regulations."

In May, 1948, the Board issued an order, based upon a motion filed with it by a Board Enforcement Attorney, directing defendant herein to show cause why its Letter of Registration should not be revoked for knowing and wilful violations of the Act, and why the Board should not issue an order requiring defendant to cease and desist from such violations, and why its Letter of Registration should not be suspended during the pendency of the proceeding. By an order of the Board, dated August 24, 1948, the plaintiff herein and certain other air carriers were permitted to intervene in that proceeding. Prior thereto, and on August 4, 1948, the Board, upon the motion papers and the defendant's answer thereto, and upon matters within its official knowledge, including the operational and flight reports theretofore filed by defendant, made an order finding that the defendant had operated numerous flights of such frequency

"as to indicate and imply a normal consistency of operations between points and therefore have exceeded those operations between

> designated points deemed to be authorized by section 292.1 of the Economic Regulations";

that defendant herein held itself out to the public as operating

> "regular or reasonably regular services between such points";

that defendant herein had admitted that it had violated the Act in other specified respects. Thereupon the Board ordered that defendant's Letter of Registration be suspended during the pendency of that proceeding, and assigned the case for public hearing before an examiner of the Board, at a time and place thereinafter to be designated.

On September 20, 1948, the United States Court of Appeals for the District of Columbia made an order staying the aforesaid order of the Board pending final disposition of the case, or until further order of the Court in the case. Consequently, in the determination of this motion, defendant's Letter of Registration must be deemed still in full force and effect.

Since, by reason of Section 1007(a) of the Act, a "party in interest may invoke the court only in cases involving violations of Section 401(a) of the Act, and since Irregular Air Carriers are exempted from the provisions of Section 401(a), the question of jurisdiction of the court in this case depends on whether or not defendant is still an Irregular Air Carrier within the meaning of the Act. This depends on whether a carrier, whose Letter of Registration as an Irregular Air Carrier is still outstanding and in effect, automatically ceases to be an Irregular Air Carrier within

the meaning of the Act if it operates with greater regularity than the court could find permissible for Irregular Air Carriers, or whether, on the other hand, one to whom such a Letter of Registration has been issued continues to be an Irregular Air Carrier within the meaning of the Act until the Board makes a finding that exemption from the requirement of a certificate of convenience and necessity is no longer in the public interest (Economic Regulation 292.1(d)(2)), and suspends or revokes the Letter of Registration. (id. (4)(5).)

What constitutes the operation of air flights "regularly or with a reasonable degree of regularity," and what constitutes service "of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation" is not defined in the Economic Regulation or the Act; the definition was wisely left flexible because, as the Regulation and the Explanatory Statement promulgated by the Board in connection therewith show, what would constitute "regularity" or "a uniform pattern of normal consistency of operation" might vary with time, place, nature of the flights and other circumstances. Irrespective of the simplicity or complexity of the question in this particular case, it is evident that the question is of a kind that can be a highly technical one, calling for expert knowledge of the industry, and that the Board, which phrased and promulgated the Regulation, and with which operational reports of all irregular air carriers are regularly filed,

> "So that it may maintain adequate supervision * * * with respect to exempted operations",

is much better equipped and qualified to determine it than the Court could possibly be.

It is to the Board alone that the Act gives the authority to classify air carriers; it is to the Board alone that the Act gives the authority to determine that it would be in the public interest to exempt from the operation of provisions of the Act any class of air carriers so created, and, when the Board so finds, to grant them the exemption (Sec. 416); it is the Board alone which was authorized to, and did, promulgate Economic Regulation 292.1, creating the classification "Irregular Air Carriers" and granting them exemption from the requirement of a certificate of convenience and necessity; it is the Board alone which is empowered to make a finding that the continuance of the exemption with respect to any carrier or class of carriers would no longer be in the public interest (Regulation 292.1(d)(4)); it is the Board alone with which operational reports of all carriers are filed (Act, Section 407(a)), which has supervision of such carrier (Act, Section 205(a)) and which is authorized to investigate, hold administrative hearings and make administrative orders with respect to violations of the Act by any carrier (Act, Section 1002), and it is the Board alone which is authorized by the Economic Regulation to suspend any Letter of Registration when, in its opinion, such action is "required in the public interest" (Subd. (d)(4)) and, after notice and hearing, to revoke the Letter ((d)(5)).

Reading the various relevant portions of the Act and of Section 292.1 of the Economic Regulation, and taking into account the public policy behind them, I conclude that it was not intended

that the Courts should, in the first instance, undertake to determine whether or not one who holds a letter of Registration as an Irregular Air Carrier, duly issued by the Board and still in effect, has forfeited the right to operate as such. I can conceive of serious chaos and conflict with the Board if the Courts were to do so. Taking all of these provisions together, I am of the opinion that the question involves matters of public interest in the domain of air transportation—a subject on which the Board is "the final arbiter" (*United States Air Lines v. Civil Aeronautics Board,* 155 F. (2d) 169, 173), and that jurisdiction to make such a determination and decision is, at least initially, in the Board. See *Adler v. Chicago & Southern Air Lines, Inc.* 41 F. Supp. 366, and cases there cited. The *Flying Tiger* case, 75 F. Supp. 188, is not to the contrary. In that case, the carrier against which Court proceedings were invoked had not been classified by the Board; it was operating without any license whatever, either as a regular carrier or as an irregular one. It was, accordingly, clearly in violation of Section 401(a) and subject to injunction proceedings by any party in interest.

In reaching my conclusion, I have not overlooked *Hawaiian Air Lines, Ltd. v. Trans-Pacific Air Lines, Ltd.,* 73 F. Supp. 68. The opinion there indicates that there may have been some points of distinction between that case and this, but, in any event, in so far as the conclusion there is opposed to the one expressed herein, I find myself unable to adopt it.

October 5, 1948.

/s/ Samuel H. Kaufman
United States District Judge

Attention is respectfully invited to the holding of this very recent case, that Judge Kaufman determined that the provisions of the Civil Aeronautics Act exempted an air carrier from Section 401(a) and that therefore the plaintiff as a "party in interest" could not bring a court action. He concluded that the Board alone had jurisdiction to determine the question of whether or not there had been a violation.

The case is essentially identical with the case at bar. The only distinction could be that in the *American Airlines* case the Board had issued an order to show cause, followed by a suspension pending final determination which suspension was stayed by the Court of Appeals. In the case at bar, the Board had not acted. But this element does not in any way affect the reasoning of the case. If any effect is given, it strengthens the application of the rule to the case at bar, since here the Board has neither acted nor *been given opportunity to act.*

The Board in its amicus curiae brief cites several cases on page 16 (top) of its brief, on the bottom of page 17 and top of page 18, and again on page 22, all for the purpose of showing that the federal Courts will take jurisdiction of a violation of an administrative regulation. The Courts not only do so, but are required to do so by law, *in proper cases.* It is to be noted that, in each instance, these are cases brought by the United States or the Interstate Commerce Commission. That the government, or its agency, may enter the Courts to enforce their regulations cannot be questioned. But that is not the case at bar. Here

a "party in interest" is entering under a limited statutory authorization to ask the District Court to determine a question which should properly be determined and acted upon by the Board itself. The case of *Interstate Commerce Commission v. Fordham Bus Corp.,* 38 Fed. Supp. 739 (S.D. N.Y. 1941), particularly referred to by the Board on page 16 of its brief and cited on pages 17 and 22, is illustrative. In this case, the bus company was authorized to operate a special or charter service, and proceeded to run a regular schedule on weekends and holidays and sell tickets. The Interstate Commerce Commission *itself,* under statutory authority, entered the District Court to enjoin the violation of its order. The Commission had delineated the authorized operations of *this particular bus company.* That is not the case at bar. The Board has at no time acted, or had an opportunity to act or determine, whether or not this *particular airline* was violating the promulgated regulations. And *that,* appellant contends, is a primary function of the Board.

To the same result is the effort spent by appellee in its brief on pages 16 and 17, wherein it discusses *Columbia Broadcasting System v. United States* (1942), 316 U. S. 407. In that case, the Federal Communications Commission promulgated a body of regulations under which it *would in the future* determine its action. The broadcasting company challenged the regulations under statutory authority for review. The question was, did the futurity element bar present challenge? Appellee quotes from the case to show

that the federal Courts will consider administrative rulings. There is no doubt but that they do—and do so many times—*in appropriate instances* and on appropriate bases. Appellant is contending that this particular case is not one of such cases, and that, appellant being exempt from Section 401(a), the determination in this case was one for the primary consideration of the Board.

II. THE BOARD HAD PRIMARY JURISDICTION TO DETERMINE THE ISSUES OF FACT PRESENTED TO THE DISTRICT COURT.

This brings the discussion to what is in fact the more comprehensive point for the reason that the question of the determination of whether there has been a violation is on good principle and practice within the primary jurisdiction of the Board, and the Civil Aeronautics Act should be construed to so provide.

Where the reasons exist, the rule should exist. In its opening brief, appellant traced the development of the rule of primary jurisdiction, the reasons underlying it, and its application to the case at bar. It was also pointed out in the opening brief that the lower Court did *not* determine a violation of Section 401(a), the only basis upon which appellee can be in court, but in fact and in every real respect, construed and interpreted an economic regulation of the Civil Aeronautics Board. Appellant pointed out the attendant difficulties in which the lower Court found itself by

so doing—the necessity to limit and condition its decree and the writ issued upon future Board action.

Both appellee and the Board in their briefs endeavor to avoid the rule by a contention that the Board had enunciated a measuring stick in the form of both regulation and interpretation, and the rule was thus avoided on the familiar and well-accepted principle that there is not primary jurisdiction in the administrative agency when the Court is only called upon to interpret as a *matter* of *law* the *words* and *effect* of an administrative order, or to apply such an order as a matter of law.

But that is not the case at bar. And of importance hereto, one of the proofs is in the very brief of the Board. On page 11 of its brief, it says:

> "This standard has been designated by the Board, in the Explanatory Statement accompanying the currently effective Section 292.1 (infra, p. 39) as a guide to operations permissible under the regulation and has been applied in a number of cases. *Although such standard does not establish a rigid pattern for operations and, consistent with the intent of a regulation permitting irregular operations, permits flexibility in the operation of a particular irregular service,* it nevertheless establishes *definite criteria* whereby *it can be determined* whether the operations of a carrier are *in fact* being conducted within the limits of the exemption." * * * (Italics supplied.)

And that is appellant's point. There are "definite criteria" whereby it "can be determined" whether

operations are *"in fact"* within the limits, but that is a *factual* determination to be made by the Board alone in *this particular case.*

It is this *determination* on the basis of *complex facts* that by the dictates of the rule of primary jurisdiction belong peculiarly to the Board. Appellee and the Board refer to the fact that there have been interpretations *by the Board* in *particular cases.* But whether there has been a violation in the *particular case at bar* is one primarily for the Board to also determine on the basis of facts adduced at a hearing on the question. This is far from being action as a *matter of law* of interpretation of an established regulation applicable to this *particular case,* or the interpretation as a matter of law of the wording of an administrative order.

A quotation appearing in the case of *Grace & Co. v. Civil Aeronautics Board* (C.C.A. 2nd, 1946), 154 Fed. (2d) 271, well illustrates the principle involved. Although on its facts, this case is not directly pertinent, this one quotation is pertinent. The case involved an effort on the part of one set of stockholders to require the Board to consider alleged unfair practices of another set. The Board had refused to so act. The Circuit Court in ordering the Board to do so, says on page 282:

> "The issue, upon which such a shareholder's suit would depend, would be whether the Pan American Company was opposing the extension because it was pursuing its own advantage to the prejudice of the joint interest ("fraud"), and

> because it was engaging in some demand the same specialized acquaintance with commercial aviation and its ramifications as a decision upon the public convenience and necessity of the extension itself. No court, state or federal, would have that acquaintance; by hypothesis the Board does have it, and the Board alone. To remove the decision from the Board, not only duplicates the time and labor, but subjects the result to the final determination of a relatively incompetent tribunal; for, if the court should decide that the Pan American Company's refusal was neither oppressive, nor unlawful, there would be an end of this proceeding, and of No. 707. It might, however, still be possible for the Board under section 411 to order the Pan American Company to 'cease and desist' from any unfair practices in which the Board—differing from the Court—might think it engaged; but surely such a conflict between court and Board would be to the last degree undesirable, regardless of the possible insufficiency of the available remedies. For these reasons it seems to us that in the proceeding the Board had power to determine, as between Grace & Company and the Pan American Company, which should speak for Panagra. Needless to say, we suggest nothing as to the proper outcome of that inquiry."

In its opening brief, appellant pointed out that the rule is dictated by the necessity of uniformity of decision, both as between different persons, and the same person in different courts, *flexibility of decision* (admitted by the Board), and future action by the administrative body (admitted in the lower Court's

decree) and the requirement of expert knowledge commented upon above.

On page 27 of the amicus curiae brief of the Board, the statement is made: "Specifically, the doctrine of primary jurisdiction applies to such questions as the reasonableness of a rate or the fairness of a rule or a practice." This is not the correct criterion. As a practical matter, many of the cases in which the rule is applied are of such a nature. But appellee in its brief quotes from *Great Northern R. Co. v. Merchants Elevator Company* (1922), 42 S. Ct. 477, 259 U. S. 285, 66 L. Ed. 943 (pp. 25 and 26 of appellee's brief) which case is also quoted by appellant (pp. 13, 14 and 15) and therein Justice Brandeis says:

> "But, ordinarily, the determining factor is *not* the character of the *function,* but the character of the controverted question and the *nature* of the *inquiry necessary for its solution."* (Italics supplied.)

Thus in this case, if the inquiry is one of involved fact and requires expert knowledge, the reason of the rule is there.

Further, Justice Brandeis says:

> "To determine what rate, rule, or practice shall be deemed reasonable *for the future* is a legislative or administrative function." (Italics supplied.)

The element of future action applies with particular force to the case at bar, as evidenced by the lower Court's difficulties with that very point.

On page 31 of its brief, the Board also refers to the *Great Northern* case in a footnote. But, taken with the preceding context of the case, the quotation appearing in the brief of the Board will be found to apply to the interpretation of the *wording* of a *tariff* as a *matter* of *law*.

The important element which distinguishes all of the cases cited by appellee and the Board as exceptions to the rule and the case at bar is that, in the case at bar, there must be an extensive *factual* determination to find if this *particular* airline is *in fact* in violation of the regulation—an inquiry which most peculiarly supplies the basic reasons underlying the existence of the rule. The Board in its brief has admitted that there is no fixed standard. Its application to a particular situation is not only one of fact, but one of flexibility (p. 11 of the Board's brief, quoted supra).

Both appellee and the Board refer to an alleged attitude of the Board in sustaining their respective positions. This is a remarkably self-serving argument. It is respectfully submitted that it is a basic judicial function to guide the administrative agency as to its proper functions and duties, if there has been a misinterpretation by it of the basic principles involved. The contentions of appellant lead to orderly and consistent administrative operation, and are premised upon a long development of administrative practice.

The Board in its brief states that an application of the primary jurisdiction rule and holding appellant to be exempt from Section 401(a) and thus outside

the provisions of 1007(a) insofar as being subject to a suit by "a party in interest" would nullify the provisions of Section 1007(a) (pages 6 and 25 of the Board's brief). Such a statement is entirely without foundation. In the first place, the case at bar involves the bringing of a suit "by a party in interest," only permitted by the statute when there has been a violation of Section 401(a). And this suit is brought without any recourse to the Board. The appellant has been issued a Letter of Registration for operations under the regulatory power of the Board. *By Section 416, appellant is thus exempted from Section 401(a).* (See *American Airlines v. Standard Airlines,* supra.) The determination of whether there has been a violation involves administrative discretion after the hearing of a large body of operational facts, and the Board has a wide latitude of decision—administrative discretion. To urge that the Board is the proper tribunal in this specific situation, does not in any way deprive the courts of power to act after the decision by the Board, to enjoin if the Letter of Registration is revoked or suspended, or to enforce any other order of the Board.

In *Pacific Northern Air Lines v. Alaska Air Lines* (District Court, Alaska, Third Division A4768, decided August 7, 1948) referred to and quoted from by the Board in its brief, there had been an order to show cause issued by the Board, followed by a "cease and desist" order. Plaintiff then instituted a Court proceeding as "party in interest". The Court followed the reasoning of the lower Court in the case at bar that there was a *pro tanto* violation of

Section 401(a). But as a consequence the Court later found itself in trouble. For when the defendant endeavored to show that its operations were *in fact* within the policy of the exemption, the Court was forced to refuse consideration of the defense on the *basis that such a determination was within the primary jurisdiction* of the *Board,* expressing the very reasons which have been outlined in appellant's briefs.

This is an excellent illustration of the basic error of the lower Court's position. In accepting jurisdiction of a *part* of the case, the Court was unable to consider *all* of the case. Had the Court recognized the fundamental primary jurisdiction of the Board, for which appellant is contending, such situations cannot arise, and the established principles of orderly administrative procedure are adhered to.

Appellant desires to strongly urge that the decision reached by Judge Kaufman in *American Airlines, Inc. v. Standard Air Lines, Inc.* (see supra) (decided October 5, 1948), expresses the correct and salutary conclusion as to the contentions made by appellant, and that this Court should reject the unsound conclusions reached by the lower Court in the case at bar and on appeal here, and should also reject the conclusion reached by the lower Court in the earlier decision of *Pacific Northern Air Lines v. Alaska Air Lines* (District Court, Alaska, Third Division, A4768, decided August 7, 1948), referred to by the Board, in which case the Court was considerably persuaded by the case at bar.

CONCLUSION.

For all the foregoing reasons, it is respectfully submitted that the judgment and order of the District Court was, and in all respects is, error, and appellant respectfully prays that the judgment and decree be reversed, the writ of injunction be ordered vacated, and the matter remanded with a direction of dismissal.

Dated, San Francisco, California,
November 29, 1948.

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